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Submitted Electronically

Office of Regulations and Interpretations
Employee Benefit Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712, D-11713, D-11850
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RE: Comments Related to the Department of Labor's Proposed Regulatory Package on the Definition of the Term "Fiduciary" (RIN 1210-AB32); Best Interest Contract Exemption (ZRIN 1210-ZA25); Amendment of PTE 84-24 (ZRIN 1210-ZA25)

Dear Sir or Madam:

The Principal Financial Group® appreciates the opportunity to provide comments on the following United States Department of Labor's (Department) proposals: (1) Definition of the Term "Fiduciary" under the Employee Retirement Security Income Act of 1974 ("ERISA"); Conflict of Interest Rule—Retirement Investment Advice,[1] (2) Best Interest Contract Exemption (the "BIC Exemption"),[2] (3) Principal Transaction Exemption,[3] and

[1] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Definition of Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice* [RIN: 1210-AB32], 80 Fed. Reg. 21928 (Apr. 20, 2015) (the "Re-Proposing Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08831.pdf.

[2] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Best Interest Contract Exemption*, Application No. D-11712 [ZRIN: 1210-ZA25], 80 Fed. Reg. 21960 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08832.pdf.

(4) related amendments to four existing prohibited transaction class exemptions[4] (collectively, the "Proposed Rule").

Our comments and observations are based on many years in the retirement and financial services industry. We currently provide retirement services, including recordkeeping, investment, education and administrative services, to more than 43,000 retirement plans and 4.2 million employee participants, including more than 29,000 retirement plans of small businesses[5] and their 620,000 employee participants. In conjunction with affiliated financial professionals, we provide investment services to more than 600,000 IRA customers. Additionally, our affiliated financial professionals provide investment, education and financial planning guidance to individual investors outside of their employer-sponsored plans.

We are committed to serving the public's retirement needs. We have over 4,100 employees who are dedicated to supporting retirement plans and individual investors. We have approximately 880 employees and over 1,500 affiliated financial professionals, located across the country, who work directly with small plan sponsors, retirement plan participants, retail investors and financial professionals on a daily basis. They answer questions, conduct enrollment and education meetings, and provide one-on-one financial education to clients at their worksite, at their home or over the phone. Our

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[3] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs*, Application No. D-11713 [ZRIN: 1210-ZA25], 80 Fed. Reg. 21989 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08833.pdf.

[4] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Broker-Dealers; Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, Application No. D-11687 [ZRIN: 1210-ZA25] 80 Fed. Reg. 22004 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08836.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters*, Application No. D-11850 [ZRIN: 1210-ZA25], 80 Fed. Reg. 22010 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08837.pdf; DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86-128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75-1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*, Application No. D-11327 [ZRIN: 1210-ZA25], 80 Fed. Reg. 22021 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08838.pdf; and DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Proposed Amendments to Class Exemptions 75-1, 77-4, 80-83 and 83-1*, Application No. D-11820 [ZRIN: 1210-ZA25], 80 Fed. Reg. 22035 (Apr. 20, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-04-20/pdf/2015-08839.pdf.

[5] Retirement plans of small business defined as those with fewer than 100 participants.

combined customer service centers receive more than 7,000 requests daily – and more than 1.95 million requests each year from individuals seeking information and assistance. These numbers don't begin to address the calls and meetings that over 100,000 unaffiliated financial professionals and their staff are having with our mutual clients on a daily basis.

The Principal Financial Group shares the same overall objective as the Department – to help American savers better position themselves to meet their retirement income needs. However, we do not believe that the Proposed Rule fully achieves this shared objective. We are deeply concerned that, if left unchanged, the Proposed Rule will result in a dramatic reduction in essential financial assistance and education for the very groups the Department is seeking to protect: low- and moderate-income individuals and small employers.

Unfortunately, the Proposed Rule imposes substantial burdens on providing education and advice to individuals, decreasing the likelihood they will participate in plans, increase savings, or stay in the system. It also increases the burden on small businesses, decreasing the likelihood that they will choose to adopt retirement savings plans or that those small businesses that currently offer employees a retirement savings plan will continue their plan.[6] The Proposed Rule also completely and inexplicably excludes most small employer plans from any workable exemptive relief. The end result of this reduction of essential support for American savers will be lack of savings and ultimately loss of the ability to retire securely.

Additionally, while we support a best interest standard, we do not agree that the Department is the proper entity to unilaterally enact this change. We believe that this activity must be harmonized with that of other federal agencies and self-regulatory organizations, and that any rule must preserve access to crucial financial education and assistance for small employers and individual savers. Any new best interest standard must allow individual savers and plan fiduciaries the ability to work with the financial professional of their choosing and to negotiate the method of payment for financial services and products.

We are also convinced that the assumptions underlying the conclusions regarding the likely economic impacts of the Proposed Rule are unrealistic in terms of the resources required to fully implement the Proposed Rule and the negative effects on plans and participants.

In reviewing the Department's Proposed Rule in light of the shared objective of assisting American savers to better position themselves to meet retirement income needs, we believe that the Proposed Rule falls short of meeting the shared objective. Because the

[6] GREENWALD & ASSOCIATES, *The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits,* 2014

Proposed Rule would adversely affect the retirement savings of millions of Americans by reducing or eliminating access to financial education as well as advice, we believe the result of the Proposed Rule will be: (1) reduced contributions to retirement savings,[7] (2) inappropriate investment allocations,[8] (3) a decline in the number of small business sponsoring retirement plans,[9] and (4) increased pre-retirement cashouts of retirement savings.[10] We stand with the opinions expressed in the vast number of comment letters that echo these concerns. For purposes of this letter, however, we will focus our comments on the following specific concerns we have about the Proposed Rule:

(1) By expanding the definition of fiduciary and narrowing the definition of education, the Proposed Rule effectively eliminates the meaningful access that small plan fiduciaries, plan participants, and individual investors currently have to educational information about investments and options that are available to them.

(2) The proposed BIC Exemption has significant practical problems and shortcomings, is unnecessarily expensive and creates unwarranted uncertainty and legal risk.

(3) The Department's Regulatory Impact Analysis and the Office of Management and Budget review process have significant shortcomings in that they used inaccurate and unreasonable assumptions that drastically underestimate the time and cost of implementing the Proposed Rule and the BIC Exemption, the

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[7] NATIXIS, *Saving is Not Enough: Liabilities, Shortfalls and the Need for Active Participation in 401(k) Plans*, 2014. (Survey of 899 participants (finding that half with a Financial Advisor, half without a Financial Advisor) found that individuals with a financial advisor contributed an average of 1-2% more of their pre-tax salary to their 401(k) across age and financial segments.).

[8] OLIVER WYMAN, *The Role of Financial Advisors in the US Retirement Market,* 2015. (Advised investors have more diversified portfolios -- own twice as many asset classes, have more balanced portfolio asset allocations and use more packaged products for equity exposure compared with non-advised investors; advised individuals, segmented by age and income, have a minimum of 25% more assets than non-advised individuals; in the case of individuals aged 65 and older with $100,000 or less in annual income, advised individuals have an average of 113% more assets than non-advised investors.).

[9] GREENWALD & ASSOCIATES, *The Impact of the Upcoming Re-Proposed Department of Labor Fiduciary Regulation on Small Business Retirement Plan Coverage and Benefits,* 2014. (Finding that if the regulatory change to fiduciary standard goes into effect, 30 percent of small businesses with a retirement plan are at least somewhat likely to drop their plan and approximately 50 percent say that it is at least somewhat likely to result in lower matching contributions, fewer investment options and higher fees for participating employees; close to 50 percent of small businesses without a plan state the regulation would reduce the likelihood of them offering a plan, with 36 percent saying it would reduce the likelihood greatly.).

[10] QUANTRIA STRATEGIES LLC, *Retirement Plan Distribution Study*, 2014. (Observing that DOL's new regulation could increase total retirement account cash-outs at Quantria Strategies, LLC.).

negative effect on plans and participants, and the negative consequences of the application of the Proposed Rule to welfare plans.

1) Limitations on the Ability to Provide Meaningful and Beneficial Financial Assistance to Consumers and Other Unintended Consequences

By expanding the definition of who is a fiduciary and narrowing the definition of education, the Proposed Rule effectively eliminates the meaningful access that small plan fiduciaries, plan participants, and individual investors currently have to educational information about investments and options that are available to them.

It is important to note at the outset that we agree with the Department that retirement-related educational materials and programs are vitally important. For nearly two decades the principles of Interpretive Bulletin 96-1 have served to afford participants access to meaningful investment-related educational materials and programs. These principles are essential in helping to ensure that educational materials remain available to participants.

In the Proposed Rule, the Department takes the position that any reference to investments or options in conjunction with asset allocation models or other materials constitutes "advice." This is a significant change to well-established and long relied upon guidelines that have provided valuable information to millions of plan participants. According to the Department, the change appears to be based on speculation that some participants may believe such references constitute advice despite representations to the contrary or that some participants may not understand that there may be other investment options despite explanations that other investments might be available to them. With the proposed change, the Department has effectively shifted the obligation to populate asset allocation models to the plan participant, who for a wide variety of reasons is unlikely to do so, thereby significantly undermining what has been a valuable tool for millions of plan participants.

In addition, there are numerous points in time when employees who are eligible to participate in employer-sponsored retirement plans have key decision points about retirement savings. Limiting education and information will have a negative effect on these decisions. For example, for many employees, their first experience with a retirement plan may include access to a financial professional or relationship manager via an enrollment meeting or the ability to call in to a customer service center for information or education needed to make decisions around enrollment. Furthermore, as savers change jobs, they have to decide what to do with their retirement accounts: leave the money they have accumulated in the former employer's plan, roll it to a new plan under their new employer, roll it into an IRA, or take a taxable distribution. Understanding the tax implications and long-term impacts of each choice can make a difference in whether they are able to retire comfortably. Today, too many employees simply cash out because they don't understand the long-term implications and end up spending their retirement savings. Education provided by a customer service center or a financial professional can assist these employees in making informed decisions.

As employees get closer to retirement, they have to figure out how to make their accumulated assets last throughout their retirement years. Again, they must make some very important decisions: when to take Social Security, what to do with the savings accumulated in their retirement account, where to invest their savings if moving to an IRA, etc. This is a crucial time to talk through the many options available to them. These key times in the life of an employee all involve decisions that affect financial security in retirement. If employees can't turn to a financial professional or their retirement plan provider, they will likely reach out to their human resources contact, other co-workers, friends or relatives who may not actually be able to provide proper education to help navigate these decisions.

Participants and IRA owners need more, not less, education on investment options and other distributions options, as well as their effects. The education carve-out that requires that educational materials avoid specificity regarding the investment or distribution options available under a plan or IRA should be amended to preserve investor education activities that are critical to managing longevity risk and stemming retirement plan leakage. In addition, while the Department makes attempts to cover common distribution-related information "including information relating to annuitization and other forms of lifetime income payment", the text of the carve-out falls short of achieving its stated goal.

The Importance of Face-to-Face Education - Enrollment and Deferral Interactions

Published behavioral finance research concludes that inertia is the principal culprit behind the lack of retirement preparedness of many American workers. The tendency of American workers to avoid taking action on their own to begin substantive financial planning and saving, and the inclination to place greater value on present rewards versus future rewards are the key challenges that must be overcome to get individuals saving and on track to meet their retirement income goals.[11]

[11] *See,* SHLOMO BENARTZIZ, *Save More Tomorrow, Practical Behavioral Finance Solutions to Improve 401(k) Plans*, Portfolio (2012); BRIDGITTE C. MADRIAN. & DENNIS F. SHEA, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,* NBER Working Paper No. 7682 (2000) *available at* http://www.nber.org/papers/w7682; JOHN BESHEARS, JAMES J. CHOI, DAVID LAIBSON, BRIGITTE C. MADRAIN, & KATHERINE L. MILKMAN, *The Effect of Providing Peer Information on Retirement Savings Decisions, Available at* http://scholar.harvard.edu/files/laibson/files/peerinfo_jof_012015.pdf; PENELOPE WANG, *How a bowl of cashews changed the way you save for retirement, available at* http://time.com/money/3853922/richard-thaler-behavioral-economics-cashews/; RICHARD H. THALER AND CASS R. SUNSTEIN, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books (2009).

The role of financial education in countering this drag on retirement savings is vitally important to plan sponsors, plan participants and individual investors. Every day, our financial professionals and participant-facing employees are tackling this challenge by interacting directly with individual investors and employees of our plan sponsor clients' retirement plans. Nowhere is the importance of financial education more evident than in the work performed by our counselors who meet one-on-one with individuals at the worksite or over the phone, providing retirement planning assistance, building awareness, an understanding of the need to act, and, ultimately building the confidence that helps individuals to take action.

In our experience, retirement plans that utilize one-on-one education, where participants meet individually with a benefits counselor, have average salary deferrals that are 14% higher and average participation rates that are 15% higher than plans without the service.[12] As important, 91% of participants who have participated in a meeting plan to take action to better prepare for retirement as a result.[13] The incidence of participants electing to automatically increase their salary deferrals in future years was 77% higher for those who participated in such a meeting than for those who did not.

These are powerful results that are direct evidence that financial education now targeted by the Proposed Rule can make a real difference in the lives of American workers. Unfortunately, the Proposed Rule threatens these and other similar education efforts. Every client interaction we have is focused on building a participant's confidence in understanding the options that are available to them. In virtually every discussion, clients are keenly anxious and often intimidated or confused by investment choices. The Proposed Rule's expansion of who could become a fiduciary by providing investment advice and the corresponding narrowing of investment education will prohibit education professionals from fully and openly discussing specific investments that have been preselected by the plan fiduciary. In addition, the Rule will make these interactions less helpful and damage the relationship with participants, placing hurdles that make it less likely participants will engage in these discussions and threatening the efficacy of these programs and the great results they deliver.

Furthermore, relationship building with participants takes time, and a level of trust has to be built before the improved results described above can be achieved. The need for education professionals to enter into a contractual relationship with each and every participant prior to this process, as required by the BIC Exemption, and as described more fully below, severely undermines these efforts.

[12] THE PRINCIPAL®, *Individual Investor Reporting,* December 31, 2014.

[13] THE PRINCIPAL®, *Retire Secure Employer Participant Satisfaction Survey,(* one-on-one survey), December 31, 2014.

Distributable Event Interactions

Equally as important as improving participation and adequate savings levels is the preservation of retirement assets when participants experience a distributable event. Today, service provider customer service center personnel and financial professionals are vital resources to help ensure participants do not hastily, and without proper education, make the decision to cash out their retirement savings, take a tax penalty, and spend the proceeds on goods and services before retirement.

Of the nearly 2 million calls we receive each year, more than 40% of these calls start with the participant requesting an account withdrawal, including distributions related to a distributable event. Under current regulations addressing distributable events, our counselors are able to describe all of the options available to the participant (i.e., cash out, maintain their account under their former employer's plan, rollover their account to their new employer (if they have a plan and the plan allows it), or rollover to an IRA), highlight the pros and cons of each option, and discuss specifics about rollover products and their current defined contribution plan account.

In these interactions, our counselors and financial professionals already follow guidelines such as those set forth by the Financial Industry Regulatory Authority (FINRA) Regulatory Notice 13-45, providing participants with an easy-to-understand educational handout summarizing the four main options available at distributable event and the pros and cons of each, discussing the importance of understanding and obtaining information on the fees of their current 401(k) account and noting that IRA fees may be higher, and providing further information on products available to them.[14]

By assigning fiduciary status to these interactions, the Proposed Rule will dramatically curtail these conversations, limiting them to general, ministerial discussions of the options available in order to ensure our customer service center employees do not cross the fiduciary line, and thus potentially engage in a prohibited transaction. When participants' inevitably ask more detailed questions about their options these questions will potentially go unaddressed and incidences of cash outs will almost certainly increase dramatically. One study estimates that the prohibitions of the BIC Exemption will increase the incidence of cash-outs of retirement savings from participants terminating employment by $20 billion to $32 billion annually.[15]

[14] FINRA Regulatory Notice 13-45, Rollovers to Individual Retirement Accounts: FINRA Reminds Firms of Their Responsibilities Concerning IRA Rollovers (2013).

[15] QUANTRIA STRATEGIES, LLC, *Access to Call Centers and Broker Dealers and Their Effects on Retirement Savings*, April 2014.

Importance of Services to Plans - 403(b) Plan Modernization

Another example of the type of necessary services that might be negatively affected is the services and information provided as part of 403(b) modernization. Over the past several years, it has become commonplace for sponsors of 403(b) plans to go through a modernization process. Often this has involved plan fiduciaries replacing individual variable annuity contracts with a more efficient group arrangement, and consolidating a multitude of plans. This is an appropriate and a usual outcome of a fiduciary due diligence review under an ERISA 403(b) plan. Unlike a 401(k) plan, where plan fiduciaries can simply direct the replacement of one investment option with another, 403(b) plans often present a greater challenge. Due to the nature of individual annuity contracts, participants are required to direct an exchange to another vehicle – a fiduciary cannot simply direct that the assets be transferred. Under 403(b) regulations, these are handled as either plan to plan transfers (if there are multiple 403(b) plans involved) or are considered contract exchanges within the same 403(b) plan.

These are generally not simple transactions for plan participants, where they would simply fill out paperwork for a contract exchange or plan-to-plan transfer. They usually require a great deal of assistance and education to understand their current annuity as well as the new investment option that the plan fiduciary has already determined is more prudent. In fact, plan fiduciaries often make determinations that the prior annuity products might no longer be prudent and discontinue all future contributions to these prior individual annuity contracts.

The employer's human resource personnel usually do not have the expertise to help participants with the specifics of an investment product and look to their financial professional and/or the educational personnel of their service provider for assistance. Under current rules, educational personnel can speak with clarity and depth about the old and new investments and encourage employees to sign the paperwork to transfer into the investment options that the fiduciary has determined are most appropriate.

Under the Proposed Rule, the investment education carve-out no longer allows for the level of detailed discussion on specific investments necessary to inform and educate participants regarding the value of the asset transfer. If education personnel cannot speak with clarity and depth about the investment options, many participants will simply never get to the level of understanding on how to complete the appropriate paperwork. Therefore, the ability to carry out the fiduciary process, and get the assets moved consistent with the fiduciary due diligence fails.

We hope that it was not the intent of the Department to include this type of education as fiduciary advice. If it is intended to be included then the BIC Exemption (or another exemption) needs to be altered or expanded. It is simply impractical and problematic to attempt to get contracts signed by each and every participant in advance of any discussion because:

(1) The plan fiduciary has already hired and contracted the educational personnel to carry out its wishes. Such attempted BIC Exemption contracting would be redundant and would unreasonably complicate the relationship building necessary with participants, and

(2) The educational personnel cannot reasonably be expected to be responsible to the standard of a fiduciary for investment decisions that have already been made by a plan fiduciary.

The Department should amend their guidance to clarify this issue.

Importance of Services to Plans-Small Businesses and Individuals

The Department's Proposed Rule effectively treats all selling and marketing activities as fiduciary investment advice when that activity is directed to small plans and IRA accounts, without regard to any understanding or agreement of the parties to the contrary.

We are concerned with the apparent arbitrariness of the Proposed Rule's framework, as well the supposition that size is a substitute for understanding this particular responsibility under ERISA, even if the same fiduciary is otherwise held accountable for understanding of and compliance with the reporting, disclosure, fiduciary, and prohibited transaction rules. Similarly, we are concerned with the lack of support for the assumption made in the Proposed Rule that IRA owners generally are not sufficiently sophisticated to distinguish advice from sales and marketing. The approach pursued by the Department in the Proposed Rule effectively eliminates, for plan sponsors, participants, and IRA owners, the ability to acknowledge and define the parameters of their engagements with third parties.

The fact of the matter is that small businesses span a wide range in their level of sophistication and understanding. There is no simple way to generalize. The level of financial sophistication of a business owner has nothing to do with the number of participants in the plan. Most small business owners are faced with market realities and decisions every day, and for those that decidedly understand their options, cutting off the ability for them to "buy" exactly what they want in an understood sales transaction undermines access to buyer preference and what they believe is prudent from a fiduciary perspective.

Additionally, we are concerned that the Proposed Rule will unnecessarily complicate interactions with all plans, as well as increase operational and compliance costs for providers and their customers. Further, the inability to conduct traditional sales and marketing efforts to small plans will significantly impede, if not preclude, efforts to close the retirement coverage gap, which is particularly acute among small employers. As the Department is aware, millions of working Americans do not currently have retirement savings opportunities through their workplace. The Proposed Rule will significantly increase costs and risks attendant to reaching out to the small employer community and, in our opinion, further exacerbate private-sector efforts to bring retirement savings opportunities to all working Americans. For many of the same reasons, the Department’s limits on sales and marketing to new and existing IRA owners will, in our view, increase the risk of leakage, thereby reducing retirement savings. An inability to reach out to potential and existing IRA owners in an efficient and cost effective way will leave far too many individuals and retirees on their own to gather information and materials about their options, while being subject to potentially competing demands from family and others to use accumulated savings for non-retirement purposes. Marketing and sales activities serve to educate consumers about their choices and ensure competitive pricing of products and services.

Inhibiting the process of obtaining a competitive quote for services to a retirement plan (often called a request for a proposal or RFP) is another item of concern. Plans and their financial professionals that are attempting to identify potential service providers for their retirement plan commonly use an RFP to collect information to allow the plan fiduciary to make an informed decision in selecting a provider. An RFP frequently requests not only information on a service provider’s capabilities, including the number and nature of investments made available by the provider, but also representative or sample investment lineups as a way of determining the provider’s capabilities and potential overall fees before the plan fiduciary actually conducts a formal review and selection of the plan’s investment lineup.

Because such a response “could be considered” by a plan fiduciary to be a recommendation that the service provider be retained by the plan, it is possible that the service provider could be turned into a fiduciary, thereby making certain payments to the service provider problematic and perhaps prohibiting the payment altogether. While there is an indication in the preamble to the Proposed Rule that a response to an RFP is not fiduciary advice, the Department should make it clear that these activities are arms-length sales interactions where neither party has an assumption that the provider is acting in a fiduciary role.

Importance of not inadvertently limiting investment options-Stable Value

Stable value funds play an important role in the investment option line-up for those plans that include them as an available choice for plan participants looking for a relatively low-risk investment that provides protection of principal and steady income that, over time, has exceeded returns from money market investments.

The most common way for plans (particularly smaller plans) to invest in stable value is through a commingled fund in the form of a bank collective investment fund. Such a fund has the advantage of being able to diversify among multiple stable value providers and products. Because these funds are structured as bank collective funds or insurance company separate accounts in which ERISA-covered plans invest, their assets are treated as plan assets subject to ERISA. Thus, the parties who manage and provide advice with respect to the funds' investments are fiduciaries subject to ERISA's fiduciary responsibility provisions. These funds are typically managed and operated in reliance on the class exemptions for qualified professional asset managers (QPAMs) (PTE 84-14), in-house asset managers (INHAMs) (PTE 96-23), and bank collective investment funds (PTE 91-38), to the extent exemptive relief is necessary.

However, the Proposed Rule may have implication on the management and operation of stable value investment options. The fiduciary managing the fund frequently deals with third parties when purchasing investment and insurance contracts for the stable value arrangement. If a broker-dealer, insurance company or other party engaging in a transaction with the stable value investment option were treated as an investment advice fiduciary with respect to that transaction, the Proposed Rule would not provide a sufficient level of relief from the ERISA prohibited transaction rules. We do not believe that this is an appropriate result. We urge the Department to consider in any final rule, the implications of the management of a stable value fund to those involved in underlying transactions including the issue of wrap contracts to ensure that participants do not lose the ability to use this very important investment option.

2) The Practical Shortcomings of the Proposed BIC Exemption

In connection with the Proposed Rule, the Department has proposed the BIC Exemption. This is a previously unexplored approach to prohibited transaction exemptions and is highly complex and technical in nature. The BIC Exemption is intended to permit investment advice fiduciaries to receive otherwise prohibited compensation in connection with transactions involving IRA owners, plan participants and beneficiaries with direct investment authority, and plan sponsors of certain non-participant directed plans. The BIC Exemption is fraught with legal issues and practical shortcomings. To be eligible for this BIC Exemption, certain conditions must be met. First, any financial professional (and any financial institution retaining the services of such financial professional) relying on the BIC Exemption must enter into a written contract that affirmatively acknowledges that they are fiduciaries under ERISA or the Code with respect to any recommendation that may be made to the retirement investor. The proposed BIC Exemption spells out specific and detailed standards, warranties and disclosures that must be included in the contract. Both the applicable financial professionals and the applicable financial institutions must agree within this contract that:

(1) Each will provide investment advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regard to the financial or other interests of the financial professional, financial institution or any of their affiliates or any other party;

(2) Each will not recommend any assets for purchase if the total amount of compensation anticipated to be received by the financial professional, the financial institution, and their affiliates and any related entities in connection with the purchase, sale or holding of the asset will exceed reasonable compensation in relation to the total services provided to the retirement investor; and

(3) All statements they make regarding the asset, the fees, the material conflicts of interest that they face in connection with the proposed transaction, and any other matters relevant to the investor's investment decisions, will not be misleading.

In addition, the BIC Exemption imposes a number of additional warranties that both the financial professionals and the financial institutions must make, including that:

(1) The financial professional, the financial institution, and their affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the asset, and the payment of compensation related to the purchase, sale and holding of the asset;

(2) The financial institution has adopted written policies and procedures reasonably designed to mitigate the effect of material conflicts of interest and ensure that its individual financial professionals adhere to the impartial conduct standards; and

(3) Neither the financial institution nor (to the best of its knowledge) any affiliate or related entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual financial professionals to make recommendations that are not in the best interest of the retirement investor.

A significant number of limitations, however, make the BIC Exemption extremely challenging and disruptive from a practical perspective. The requirements, moreover, that the Department proposes to impose under the BIC Exemption, include a number of elements that are arguably not helpful for the protection of the retirement investors as well as impose unnecessary burdens, costs and restrictions on the financial professionals and financial institutions that would be providing services to such retirement investors. We join with the sizeable number of other commenters who have observed and commented that significant revisions are required to make the Proposed Rule work effectively and efficiently to protect the interests of retirement investors, in a manner that will still provide them affordable access to the services of their preferred financial professional and financial services institution.

The proposed exemption departs from the format of prior exemptions that have allowed transactions that have benefitted many plans, participants and individual investors over many years and creates numerous ambiguities and practical issues.

Assistance to Small Employer Plans

By definition, the BIC Exemption inexplicably does not cover advice that would be provided to small employers and there does not seem to be any other exemption left that is available universally to small plans. This is especially puzzling because the Department has stated it has a strong interest in benefitting these employers. Specifically, the BIC Exemption does not apply to compensation received related to investment advice that is provided to plan sponsors of participant directed plans with fewer than 100 participants.[16] It is our experience that the vast majority of defined contribution plans sponsored by small employers permit employees to direct the investment of their own account.[17] Further, we have observed that it is often small employers that benefit most from the information provided regarding their plan. While a prohibited transaction exemption is clearly needed, we do not believe the interests of plans sponsored by small employers would be served by including them under the BIC Exemption. Instead, we believe that their interests are preserved by the existing prohibited transaction exemptions available today. Prohibited Transaction Exemptions such as PTE 84-24 should be expanded and clarified to remain useful exemptions for sales to small plans.

Ambiguity of Terms

The Department states in the preamble that the BIC Exemption is designed to allow continued receipt of commissions, yet the text of the rule does not create a clear, operational standard that accounts for the industry's diverse business models. The ambiguity as to permissible compensation structures will result in the courts or the Department, rather than the retirement investor or the market, deciding the manner in which a retirement investor can pay for services. Allowing a court or a regulator to decide after the fact whether differential compensation in the form of commissions satisfies this standard is clearly problematic, to say the least.

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[16] *Retirement Investors*: (1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; (2) The beneficial owner of an IRA acting on behalf of the IRA; or (3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a non-participant-directed Plan subject to Title I of ERISA with fewer than 100 participants, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.) 80 Fed. Reg. 21960 at 21984.

[17] 98% of our small 401(k) plan clients, per the Department's definition under the Proposed Rule, allow employees to direct the investment of their own account.

"Without Regard" Provision

To meet the conditions of the BIC Exemption, the financial professional and the financial institution must agree that each will provide "investment advice … without regard to the financial or other interests of the Advisor, financial institution or any of their affiliates or any other party."[18] This provision could easily be interpreted to imply that if a financial professional has any financial interest in a retirement plan or IRA transaction at all, he or she has violated the "without regard" provision, because the interest is just too omnipresent. Institutions create investment products that are offered to its customers for sale. There will always be some degree of difference of interest between the institution and the investor. The institution designs products that it believes will serve the needs of its clients, with the intent and objective that such products will provide the institution a profit because the clients will understand the benefit of access to the product. Even an independent financial professional has interests, such as compensation, keeping a customer, relationships with the investment company, and so on. It is hard to imagine an environment where any investment product or service could be offered entirely "without regard" to the interest of whomever is making a profit from the conduct of the business.

In addition, the BIC Exemption is drafted in such a way that it will create unnecessary conflicts between it and current suitability requirements (i.e., FINRA and state suitability rules). Under the current suitability standard, one looks at whether there is a reasonable basis for determining if the sale is suitable for the individual customer – not necessarily the "best" product. By introducing this suitability-plus standard, the Department is potentially creating layers of confusion about which standard applies at what level in the process.

The standard proposed by the BIC Exemption is more restrictive than even the standard for fiduciaries under ERISA, which the Department has recognized allows for certain incidental benefits due to the fiduciary's relationship to the plan.[19] While it is unlikely that the Department expects that financial professionals as fiduciaries could interact with any customer entirely without regard to whether or not they will be compensated, the definition is very broad and subject to this unreasonable interpretation. We recommend the language of the proposed exemption be modified to reflect marketplace realities.

Differential Compensation

As noted above, the BIC Exemption requires financial institutions to warrant that they do not pay their financial professionals differential compensation that would tend to incent

[18] 80 Fed. Reg. 21960 at 21984.

[19] *See* ERISA Advisory Op. 2001-01A (January 18, 2001).

the financial professional to make recommendations not in the best interest in of retirement investors. Separately, though, financial institutions are required to represent that the compensation received by the financial institution, the financial professional, affiliates and related parties is reasonable for the services provided to the retirement investor. These two separate requirements create some ambiguity as to whether the customary compensation practices would be permitted going forward. Further, if the financial institution places limits on the investments it offers, then under another section of the exemption, the Department sets forth an even higher standard that requires the financial institution to justify each payment stream with separate and distinct services. These requirements are over and above the basic requirement that the financial professional only make recommendations that are in the best interest of investors. We join with those commenters asking that these additional requirements under the BIC Exemption impartial conduct standards be eliminated, or sufficiently modified so as to be congruent with existing obligations.

Reasonable Compensation

The BIC Exemption requires that the fiduciary agree that they will not recommend an Asset if the total amount of compensation anticipated to be received in connection with the purchase, sale or holding of the asset will exceed reasonable compensation. While the inclusion of a "reasonable compensation" requirement may appear to be innocuous, we believe that its inclusion in the BIC Exemption will have several negative consequences. For example, the term "reasonable" will be defined differently by different courts in different states, which will do little to help clarify for broker dealers or even fiduciaries whether they are being compensated in a "reasonable" manner for the sale or the services provided or not. Because of the uncertainty as to what will be considered "reasonable" compensation, financial professionals may automatically default to the lowest cost alternative, which may or may not be the best product for a particular customer. There are important components other than cost that should be considered (e.g., financial strength (ratings) of the insurance provider, service capability, investment options and guarantees).

Timing of Contract Delivery

Another practical consideration is that the BIC Exemption would only apply if a contract is entered into prior to discussions. The BIC Exemption provides that "prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset, the Advisor and financial institution enter into a written contract with the Retirement Investor" that incorporates the required contract terms.[20] One problem with this requirement is that the threshold for determining when a conversation about an investment option or an election to take a distribution from a plan, for example, turns

[20] 80 Fed. Reg. 21960 at 21984.

into a recommendation as to selling or holding an asset is so vaguely defined that it would be an all too easy line to cross inadvertently while working toward a contract.

This means that the practical reality under the BIC Exemption, as drafted, is that given this uncertainty, the advice recipient, the financial professional, and the financial institution would need to enter into a contract at the beginning of the conversation to ensure discussions that could be a recommendation regarding an investment option are covered. Our experience is that this contract timing would likely have a chilling effect on conversations with individuals who most need assistance, including education. Such a rule would be cumbersome, to say the least. As noted earlier, each year our customer service centers receive nearly two million calls from participants seeking assistance regarding their plan. This assistance can include basic questions such as password resets, but often include requests or questions about various forms of distribution, including plan loans and lump sum payouts, as well as periodic payments and rollovers. There appears to be a potential argument that a discussion with a plan participant by a salaried customer service center employee who happens to be employed by an organization that provides services to a plan could be viewed as a recommendation, potentially turning the customer service center employee into a fiduciary.

As an example, suppose an individual participant calls in and inquires about the process for taking a lump sum distribution. He or she would like to take the distribution and purchase a new boat. It is unclear whether a discussion about the benefits of remaining in the plan and the potential adverse tax consequences for such a distribution could be viewed as a recommendation. Further, if the participant is invested in an investment option that is affiliated with the customer service center employee's employer or if there is a per participant distribution fee, it would need to be determined whether the customer service center employee make a recommendation that represented his or her employer or affiliate? Would it be necessary to enter into a formal contract in order to have the conversation? Does this lead to a less than useful and friendly customer service experience? Complicating the issue of requiring a written contract before conversations can take place is that these conversations are often occurring over the phone.

Furthermore, the language of the BIC Exemption suggests that the contract would be a three party contract in which both the individual financial professional and the financial institution would be required to enter into the contract. This presents a number of practical considerations. What happens if the individual financial professional leaves employment, is on vacation, or is otherwise unavailable? Can they substitute another person with the firm without signing a new contract?

It would be extremely difficult to operationalize this requirement where a retirement investor works with multiple financial professionals. Take for example a financial institution that provides plan participants or IRA owners with recommendations through a customer service center. Would each phone representative have to be a party to each contract or would calls have to be directed to the financial professional or financial professionals that were a party to the contract for that particular plan participant or IRA owner? Either way, if there is any level of turnover then the contract would need to be amended to add new financial professionals on a constant basis. Even with respect to financial professionals who work in a close one-on-one basis with retirement investors it has become more common for these financial professionals to work in a team practice with financial professionals that specialize in different products and issues. As long as the financial institution is a party to the contract and takes responsibility for the actions of its financial professionals there would be no additional protection provided to the retirement investor by having the financial professional be a party to the contract. For these reasons we join with others who are respectfully requesting that the Department change the requirement to require that only the financial institution be a party to the contract.

Disclosure Requirements

The BIC Exemption also requires disclosure of an unprecedented amount of detailed information. This effort is not without cost and runs the risk of "information paralysis" in the recipient. Retirement Investors will be overwhelmed with granular and redundant disclosure. In addition to the contractual disclosure, the BIC Exemption would require:

(1) a public webpage showing the direct and indirect material compensation payable to the financial professional, financial institution, or any affiliate for service provided in connection with each investment that a Retirement Investor is able to purchase, hold, or sell through the financial professional or financial institution, and that a Retirement Investor has purchased, held, or sold within the last 365 days, the source of the compensation, and how the compensation varies within and among investment classes;

(2) a point of sale disclosure provided prior to the execution of an investment transaction showing the all-in cost and anticipated future costs of recommended investments in a summary chart, including the total cost to the investor for 1-, 5-, and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the financial professional, and reasonable assumptions (we note that this is likely in violation of existing SEC and FINRA rules) about investment performance (which must be disclosed) and

(3) an individualized annual written disclosure provided within 45 days of the end of the applicable year showing (a) a list identifying each investment purchased or sold during the applicable period and the price at which the investment was purchased or sold, (b) a statement of the total dollar amount of all fees and expenses paid by the investor, directly and indirectly, with respect to each asset

> purchased, held, or sold during the period, and (c) a statement of the total dollar amount of all compensation received by the financial professional and financial institution, directly or indirectly, from any party, as a result of each investment sold, purchased or held by the investor during the period.[21]

The level of information required to be provided to retirement investors significantly exceeds those established by other ERISA regulations, which were developed over numerous years in an effort to provide clear and meaningful disclosure. Such incredible depth of disclosure is not without cost, especially for the granular detail that few will read in any depth, and perhaps fewer will understand.

Delivery of voluminous information often leads to choice paralysis and inaction on the part of the recipient. For example, requiring the disclosure on thousands of potential investments typically available to an investor would require multiple phone-book size disclosures and almost certainly overwhelm the average recipient.

The contemplated annual disclosure requirements, including the total dollar amount of all indirect compensation received by the financial professional and his or her company during the year attributable to the customer, will not only provide overwhelming and confusing data, but require the collection of information that is commercially both highly challenging and problematic. This data is very different from existing Department requirements relating to disclosing indirect compensation, and would require additional systems and data collection practices that currently don't exist and would take years to build.

In addition, before a recommended purchase of an asset is made, the financial professional must provide a chart to the customer with the "Total Cost" of the asset over 1, 5, and 10 year periods, as a dollar amount, which requires the financial professional to make assumptions about future investment performance. The assumptions that would need to be made in order to calculate the Total Cost could very well run afoul of the rules of other regulatory agencies such as the SEC and FINRA.

We would ask the Department to conform any exemption disclosure requirements to those existing exemptions and regulations that provide less problematic solutions (e.g., regulations under ERISA sections 408(b) (2) and 404(a)).

The Effect of Increased Litigation

The BIC Exemption effectively outsources enforcement of the prohibited transaction rules to the plaintiffs' bar, including new potential class actions under state law. This is a significant change in the enforcement mechanisms. As a result, the Proposed Rule

[21] 80 Fed. Reg. 21960 at 21984.

would require litigation under numerous jurisdictions with various interpretations of the federal regulation. Changes in jurisdictions will have to be monitored, as will shifting rulings as, for example, a Circuit Court overrules a District Court, and each different interpretation in each different jurisdiction will increase the compliance monitoring requirements. This would also undermine the Congressional goal of uniformity. It has long been observed by the Courts that ERISA is a "comprehensive and reticulated statute," the product of a decade of congressional study of the Nation's private employee benefit system.[22] In creating the prohibited transaction rules so many years ago, Congress recognized the cost in time and assets of excessive litigation and the effective outsourcing of enforcement brings us back to that. It also introduces additional compliance costs to the system that do not exist today. Consequentially, we would expect those costs to be absorbed into the business over time, and ultimately passed on to and paid for by the investors. There has been little or no evidence submitted that would bolster the Department's argument that this Rule will significantly increase legal protections or favorable outcomes for plans or their participants such that the expense and confusion created by the Rule would be justified.

Limited Grandfathering Provisions

The BIC Exemption provides limited grandfathering for existing customers. There are millions of individuals who have existing relationships with financial professionals and financial Institutions. For long-standing customers, in particular, it will be onerous to require new signatures and may be impossible from a practical perspective to accomplish this in the short time the Department anticipates for putting the final rule into effect. The exemption requires that, no matter how long and effective the relationship, a new contract be entered into prior to additional recommendations being made. From a practical perspective, a financial institution has no way to compel existing customers who are not actively using their services to enter into any contract. This may very well cause existing customers to not receive valuable information that would have been provided before the necessity for the BIC. We propose that if the BIC Exemption is adopted, the contract not be required until a new sale is executed as opposed to being needed at the time recommendations are being discussed with regard to a previously purchased product. This would not only better follow existing financial professional/client consultation practices, but also provide relief for call and service centers in providing consultation and service to existing customers.

Prohibited Transaction Exemption 84-24

In addition to the issues presented by the BIC Exemption, there are a number of concerns with modifications to the other long-standing Prohibited Transaction Exemptions. Prohibited Transaction Exemption 84-24, for example, was created by the Department and amended over time, in large part to allow for the sale of insurance

[22] *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361 (1980).

contracts (and certain principal underwriter mutual fund sales) with full disclosure to plans and IRAs. The Department clearly understood that insurance is sold by appropriately licensed agents and that the agent must be appointed by the company before compensation can even be paid. The Department also understood that every agent is not allowed to sell every insurance contract, but that an agent may be limited in what they are allowed to sell. The Department is now proposing to amend PTE 84-24 in a manner that is very inconsistent with current practice, without a reasonable explanation or rationale for this important change.

Under the Proposed Rule, PTE 84-24 would no longer be available for variable annuities sold to individuals, and, instead, the PTE available for such products would be the BIC Exemption. In contrast, financial professionals selling fixed annuities would be able to use either PTE 84-24 or the BIC Exemption for sales to individuals. This asymmetry appears to assume that the financial professional will know which product is appropriate for the customer in advance or only offer to sell fixed annuities to the customer.

For the reasons discussed above, the BIC Exemption, as currently proposed, does not work well. PTE 84-24 is already in use and fits the sale of insurance in a much more efficient, proven, transparent and clear manner. According to its Regulatory Impact Analysis, the Department believes that sales of variable annuity contracts are so similar to sales and investment advice regarding mutual funds that they should occur under the conditions of the BIC Exemption. However, the Department's assessment in this regard ignores certain critical risk characteristics of individual variable annuity contracts that align these contracts more closely with insurance than many types of securities. An annuity contract remains an insurance product with the appropriate guarantees, even with the addition of a variable investment feature. Variable annuity contracts are insurance contracts and, contrary to the Department's assertions in the preamble, they do not cease being insurance when they become variable. Instead, a variable annuity combines traditional insurance concepts and the variable provisions to solve two increasingly important problems in retirement planning – rising life expectancy and the declining value of the dollar over time.[23] The Department's failure to include these contracts under the amended PTE has the tendency to lead to the consumer getting less information and less choice and seems to be unwarranted given the disclosure requirements of PTE 84-24, the requirement that the sale be in the best interest of the consumer, and the general awareness on the part of consumers that insurance agents are paid to sell insurance. Accordingly, the Department should reconsider the currently distinction between these contracts under the amended PTE 84-24, and revise the PTE to cover the sale of all annuity contracts.

[23] *Regulation of Variable Annuity Sales: The Aftermath of SEC v. VALIC,* 1959 Wash U. Law. Q. 206 (1959).

In addition, the added definition of “Insurance Commissions” under the proposed amendment to PTE 84-24 is far too narrow, changing traditional forms of compensation for no apparent reason. Under the Proposed Rule, Insurance Commissions would be newly defined as commissions paid by the insurance company or any affiliate of the insurance agent, insurance broker, or pension consultant for effecting the purchase or sale of an insurance or annuity contract. It would include renewal fees and trailers, but would prohibit financial professionals from receiving relief under the PTE for many other traditional revenue sources, such as revenue sharing and administrative and marketing fees, as well as payments from third parties. This revision could be read to prohibit financial professionals from receiving these types of payments for sales to both plans and to IRA owners. The definition should be broadened to include more traditional forms of compensation to avoid unnecessary confusion and the expense of running dual systems for no apparent gain.

In order to allow both plans and IRAs to continue to purchase insurance and annuity contracts in the normal course of business, PTE 84-24 should be expanded. This expansion should treat variable annuity purchases by individuals as covered transactions, and should allow for greater flexibility within the definition of “commission” to allow for traditional forms of financial professional compensation. Furthermore, it should be clear that the exemption provides for relief for existing transactions that rely on the exemption in its current form.

In addition to the changes to PTE 84-24, for the reasons noted in this letter, we observe that the Department should revisit the proposed changes to other long-standing prohibited transaction exemptions to ensure there are no unintended consequences from the changes proposed.

Small Amount Force-Outs and Automatic Rollover

Underscoring the disruptive nature the Proposed Rule could have on the landscape, it is unclear how many common practices will fit under the Proposed Rules. One such area is the Small Amount Force-Outs and Automatic Rollovers. Plans may automatically make distributions to terminated participants without their consent if the value of their vested accrued benefits (or vested account balances, in the case of defined contribution plans) is $5,000 or less. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) made changes to these rules to require that certain small cash-outs be automatically rolled over to an IRA, unless the participant elects to take cash or make a different direct rollover. This automatic rollover requirement applies if the value of the participant's vested accrued benefit or account balance is more than $1,000 but less than or equal to $5,000. Plans must provide participants with a notice explaining the automatic rollover provision.

Because these requirements created concerns about plan sponsors' fiduciary responsibilities under ERISA when choosing both a default rollover IRA provider, as well as the initial IRA investments, on September 28, 2004, the Department issued final rules describing a safe harbor for fiduciaries making such decisions.[24] To comply with the automatic rollover requirement, plan sponsors must designate an institution to receive the rollovers. Plan sponsors must also choose how the rollovers will be invested. These actions are subject to ERISA's fiduciary standards. The Department's final rules provide that a plan sponsor or administrator will be deemed to have satisfied this fiduciary responsibility if certain requirements are met.

The Department should clarify that the Proposed Rules do not affect its 2004 guidance regarding Automatic Rollovers. The Department should further clarify that discussion by service providers with plan sponsors regarding the type of investment that is available for the automatic rollover would not constitute investment advice.

3) Significant Shortcomings in the Department's Regulatory Impact Analysis and the Office of Management and Budget Review Process and the Potential Application of the Proposal to Welfare Plans

Implementation Estimates

The Department's estimates regarding the time that will be needed by the industry to implement the changes associated with the Proposed Rule illustrates a significant disconnect regarding the level of disruption that will be created. In order to ensure that the requirements of the Proposed Rule are met, we fully expect the time frame and cost of implementation to be much higher than estimated. The eight months allowed to update all systems (and determine where to build or outsource the functionality required) and communicate with all plans, participants, beneficiaries and IRA holders is simply not enough time. Based on the time spent on other similar regulatory changes, we expect that at a minimum, it would take 24 months to have the necessary systems in place.

For instance, regarding some of the disclosure requirements, service providers would need to determine whether the data needed to prepare the required disclosures exists today in a usable format. Based on our initial review, we know that much of the needed information currently does not exist in such a format.

In addition, the overall system assessment process would require significant input from numerous business areas, systems specialists, and legal and compliance resources. As with all projects of this size, outside vendors and potential contractors with the skill sets and knowledge needed to assist with the implementation of the required systems and process changes would need to be identified and engaged. Any information that does not currently exist would need to be built and integrated with existing systems.

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[24] DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMIN., *Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974 Automatic Rollover Safe Harbor*,[RIN 1210-AA92] 69 Fed. Reg. 58018 (Sep. 28, 2004).

Given the broad scope of the Proposed Rule, the various changes will span many different system structures and require a significant level of coordination among all stakeholders.

Once the assessments are complete and system changes implemented, the next step is to test the data and outputs to ensure that all of the changes are displaying on all necessary systems and documents. Affected employees in a variety of business units would also need to be trained on the new systems and procedures. The changes would then need to be communicated to all involved parties, including vendors and existing clients—both plan sponsors and individuals. To be asked to go through this process in eight months is not realistic given the far reaching effects.

For comparison, the 408(b)(2) Regulations, a similar Department initiative, began with the publication of an interim final regulation with a future effective date of July 6, 2011, or a twelve month implementation timeline. An extension pushed this date to January 1, 2012, which was later moved to April 1, 2012, in the final regulation. Finally, another extension pushed the ultimate effective date to July 1, 2012. The extensions were, in part, an acknowledgement of the significant systems enhancements that were required across the industry to implement the final rule.[25] The requirements of the Proposed Rule are, in many respects, more involved in terms of the effort that would be required to develop the systems needed support the requirements of the Proposed Rule.

Welfare Plans

The Proposed Rule, as written, would treat an insurer or financial professional as a fiduciary when promoting group health (including dental, vision and similar coverages, life and disability insurance products to small businesses or employees, even in circumstances where no plan assets are held in trust). In other words, an insurer would be treated as a fiduciary with respect to certain welfare benefit plans simply by reason of promoting its own products. This activity has long been considered to be sales and there is no indication that the public is confused or otherwise considers these sales to be fiduciary advice.

If the promotion of these insurance products to small businesses or their employees does become a fiduciary act, (1) the insurer would be vulnerable to a lawsuit simply for selling its own product without sufficiently considering the advantages of competitors' products, and (2) it is unclear whether a functional prohibited transaction exemption

[25] REBECCA MOORE, *Fees the Focus of EBSA Regulatory Agenda*, PLANSPONSOR, available at http://www.plansponsor.com/Fees_the_Focus_of_EBSA_Regulatory_Agenda.aspx. (Asked if EBSA would consider a delay in the effective date of 408(b)(2), Borzi said it is sensitive to the needs of the regulated community to have adequate time for implementing any changes that might be required by the final rule.).

would be available to permit the continued sale by an insurer of its own insurance products to small businesses.

The Department did not, in the preamble to the Proposed Rule, address this issue or provide any analysis of the economic effects of this aspect of the Proposed Rule so it may be that this effect was not intended. Nevertheless we believe that this issue should be clarified in the final regulation.

Conclusion

The Principal Financial Group appreciates the opportunity to provide comments and observations on the effect of the Proposed Rule. Ultimately, we share the Department's objective of improving retirement savings and of better positioning Americans to meet their retirement income needs. We are strongly concerned, however, that this goal will be more difficult to realize under the Proposed Rule.

From our many years of experience in the retirement and financial services industry, we believe that the Proposed Rule, as written, includes provisions that will be difficult to implement and will result in unintended consequences that will likely undermine the Department's objectives. As more fully detailed by the observations in this letter, we echo the numerous comments that believe that the Proposed Rule and the proposed BIC Exemption would negatively affect the system by which Plans and participants receive information from financial professionals, financial services institutions, and others, and would place unnecessary burdens and restrictions on the individuals and firms who could be deemed to be "fiduciaries" under the Department's proposed definition of "investment advice."

Furthermore, the Department is not the proper entity to unilaterally enact this change. We believe that this rulemaking activity must be coordinated and harmonized with that of other federal agencies and self-regulatory organizations, and that any rule must preserve access to crucial financial education and assistance for small employers and individual savers. Without this, the Proposed Rule will add unnecessary complexity and confusion. It also would lead to increased litigation, which ultimately will increase costs to consumers and possibly lead to fewer options for consumers with regard to paying for services.

Because the Proposed Rule would adversely affect the retirement savings of millions of Americans by reducing or eliminating access to financial education as well as advice, we believe the result will be: (1) reduced contributions to retirement savings, (2) inappropriate investment allocations, (3) a decline in the number of small business sponsoring retirement plans, and (4) increased pre-retirement cashouts of retirement savings.

In addition, given the significant difference between the Department's understanding of the scope of the effect on the industry and the time that would be required to implement the Proposed Rule, it is clear that the Department and the retirement services industry should work more closely together.

Accordingly, we strongly encourage the Department to consider an approach that facilitates an environment that promotes savings and retirement income as a primary objective. A system that starts with a premise that nearly everything is prohibited and then provides exemptions from those prohibitions becomes unwieldy when the number of fiduciary activities is greatly expanded and many common activities are consequently prohibited. The problems are exacerbated when the exemptions from those prohibited activities are correspondingly narrowed. A collaborative regulatory process with all interested parties participating will be the only way to achieve this environment in a reasonable fashion, without the inevitable unintended consequences of a unilateral promulgation.

Sincerely,

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